

Before the  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS

GENERAL COUNSEL  
OF COPYRIGHT

DEC 30 1997

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In re: )  
Mechanical and Digital Phonorecord ) No. 96-4  
Delivery Rate Adjustment Proceeding ) CARP DPRA

**Comments and Notice of Intent  
To Participate of the United States  
Telephone Association**

The United States Telephone Association (USTA) hereby submits the following comments objecting to certain provisions of the proposed regulations published at 62 Fed. Reg. 63,506 (December 1, 1997), and gives notice of its intent to participate in any proceedings of a Copyright Arbitration Royalty Panel that may be convened in this matter.<sup>1</sup> USTA specifically objects to proposed 37 C.F.R. § 255.6, which seeks to sweep within the scope of "digital phonorecord deliveries" both "Incidental DPDs" (an undefined term that could be read to encompass intermediate copies made by an Internet service provider in the course of the transmission of a digital phonorecord) and "Transient Phonorecords" (which are specifically defined to include copies made in Internet routers). The proposed regulation is the self-serving result of private negotiations between two organizations that represent content providers, the Recording Industry Association of America (RIAA) and the National Music Publishers Association (NMPA). The regulation exceeds the jurisdiction of the Copyright Office and any CARP it might establish under the Digital Performance Rights in Sound Recordings Act (the

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<sup>1</sup> USTA appreciates the one day extension of time to file these comments granted by Senior Attorney William Roberts on December 29, 1997.

“Sound Recording Performance Act”), and threatens to prejudice the ongoing legislative process that is addressing the scope of Internet service provider copyright liability.

The United States Telephone Association is the hundred year old trade association that represents small, medium and large telephone companies engaged in the local exchange carrier industry. USTA members are among the leading providers of online services and Internet access to the public. The Association has been deeply involved in the ongoing policy discussions and legislative negotiations concerning the extent and scope of copyright liability applicable to online and Internet service providers.

USTA shares many of the concerns of the Coalition of Internet Webcasters, whose comments on the proposed rules focus primarily on issues raised by the proposed section 255.6 in the context of audio streaming (a technology used for the performance of audio over the Internet). USTA submits these comments to express concerns that extend more broadly to intermediate and incidental copies made in the course of any audio transmission, whether that transmission is intended for performance or for the ultimate reproduction of a phonorecord by a user of an online or Internet access service.

#### **Incidental Digital Phonorecord Deliveries**

Proposed section 255.6(a) seeks to impose a royalty of the full “Physical Rate” on “Incidental DPDs.” The term “Incidental DPD” is defined only as any reproduction or distribution that is “incidental to the transmission which constitutes the digital phonorecord delivery.” This definition extends beyond the permitted statutory scope.

It is not uncommon, during a transmission over the Internet, for transmitted material to be copied automatically in servers used to facilitate network operations. For example, if a subscriber of an Internet access provider purchases or accesses a digital phonorecord delivery

from a record company website (or any other website) over the Internet, the service provider's server may automatically copy the transmitted phonorecord during the transmission of the phonorecord to the subscriber. The copying may be transitory, or the material may reside for a period of time in the server. In either event, the copying by the server serves no purpose other than to facilitate transmission. It is not accessible to other users and has no independent economic significance.

The legislative history of the Sound Recording Performance Act makes clear that Congress was concerned that digital transmissions would displace physical reproductions and thereby deprive music copyright owners of their mechanical royalty. *See, e.g.*, S. Rep. No. 104-128 at 13, 15 (the "Senate Report") (describing the Act as narrowly tailored to address the concerns that new digital technology would have on the core business of phonorecord distribution). Thus, Congress provided for payment of mechanical royalties by record companies or digital music transmission services that were in the business of selling digital phonorecords. *See, e.g.*, Senate Report at 15, 37. There is no indication that Congress intended that any royalty be paid by intermediary online service providers or Internet access providers whose facilities are used in the transmission of a digital phonorecord delivery. *See, id.*

Indeed, the Copyright Office is well aware of the debate that has been ongoing for the past several years concerning the issue of service provider liability arising out of copyright infringing conduct of those using its services. There is no evidence that Congress intended the Sound Recording Performance Act to affect this debate in one way or another. The Copyright Office should not adopt regulations that potentially prejudice the issue by implying that copies incidental to the transmission of a phonorecord fall within the scope of the Sound Recording Performance Act.

Moreover, to the extent a service provider's server has created a "phonorecord," it is not a phonorecord that in any way interferes with or substitutes for the revenue that would otherwise be received by either the record company or music copyright owner. Thus, to the extent a phonorecord has been created, it is not the kind of phonorecord that Congress intended give rise to a royalty under the Sound Recording Performance Act. *See, e.g.,* Senate Report at 15, 37.

Finally, the Act makes clear that an Incidental Digital Phonorecord Delivery must itself be a "digital phonorecord delivery." The latter term is defined in the Act as a digital transmission "which results in a specifically identifiable reproduction by or for any transmission recipient." 17 U.S.C. § 115(d). The incidental copying by a server is neither specifically identifiable (it occurs automatically, and is not identified to either the service provider or the end user) nor performed by or for the transmission recipient. Accordingly, actions occurring automatically during the course of a transmission by an intermediary service provider are outside of the scope of the Act. The proposed regulation should make this clear.

In sum, the proposed regulation governing "Incidental DPDs" does not reflect Congress' narrow intent. It is far broader than authorized by the Act, and beyond the scope of authority granted to the Copyright Office or any CARP the Office might convene under the Act.

### **Transient Phonorecords**

The proposed rules define a proposed class of incidental phonorecord delivery, "Transient Phonorecords," to broadly include, among other things, "a phonorecord reproduced temporarily in a router intermediate to the Internet." There is nothing in the Sound Recording Performance Act or its legislative history that suggests that such transitory reproductions are within the scope of the Act, or that they are even "phonorecords" within the meaning of the Copyright Act.

To the contrary, for all of the reasons discussed above with respect to Incidental DPDs, proposed section 255.6(b) is beyond the scope of the Act and outside of the jurisdiction of the Copyright Office or any CARP. Routers are intermediary and fully automatic; they typically reproduce only portions of a transmission at a time; and any reproduction that is made has no independent economic significance and is not, in any say, "specifically identifiable" or made by or for a particular recipient. There is neither justification nor statutory basis for including this new concept in the regulations governing the Sound Recording Performance Act.

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For the foregoing reasons, USTA objects to the proposed regulations. USTA believes its objections raise legal and jurisdictional issues that are beyond the appropriate scope of a CARP. However, in order to protect its interests should the Copyright Office disagree, USTA gives notice of its intent to participate in any proceeding before a Copyright Arbitration Royalty Panel convened in this matter.

Respectfully submitted,



Bruce G. Joseph  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 429-7258  
Counsel for the United States  
Telephone Association

December 30, 1997